

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA REYNOLDS)	
Claimant)	
VS.)	
)	Docket No. 208,153
JC PENNEY)	
Respondent)	
AND)	
)	
HELMSMAN MANAGEMENT, INC.)	
Insurance Carrier)	

ORDER

Respondent appeals from a Review and Modification Award entered by Administrative Law Judge John D. Clark on February 28, 2000.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared on behalf of claimant. Michael D. Streit of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is a review and modification proceeding brought pursuant to K.S.A. 44-528. The claim was originally resolved in June 1996 by an agreed award for 7.5 percent to the whole body for injury to the right wrist and right knee. The agreed award called for future medical treatment upon application to and approval by the director. The agreed award did not waive rights to review and modification.

In this review and modification proceeding, the ALJ increased the award. He found that claimant has an additional 37 percent disability to the body as a whole. This appeal involves two issues:

1. What is claimant's permanent partial disability? Respondent contends the 37 percent should be treated as including the 7.5 percent from the original agreed award. Claimant contends the 37 percent is in addition to the 7.5 percent and the total disability is 42 percent.
2. How should the benefits be calculated? The parties propose different calculations discussed in more detail below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Board concludes the 37 percent permanent partial disability should be treated as including the 7.5 percent from the original agreed award. On this finding, the Board disagrees with the ALJ. The Board finds the total current disability is 37 percent of the whole person.

The Board further finds, however, that the award on review and modification, as calculated by the ALJ, calculates the benefits as though the 7.5 percent were included in the 37 percent. The Board finds the number of weeks paid for the 7.5 percent disability to be different from the weeks used by the ALJ but otherwise agrees with the method used.

As stated, the original agreed award called for benefits based on 7.5 percent disability. The weekly rate was, and is, \$99.17, based on an average weekly wage of \$148.75. Respondent had at that time paid four weeks of temporary total disability. The 7.5 percent disability therefore called for 31.13 weeks of permanent partial disability benefits ($7.5\% \times 415 \text{ weeks} = 31.13 \text{ weeks}$). All of the benefits were due and owing at the time of the agreed award in June 1996.

At the time of this appeal, there is no dispute that claimant has experienced a substantial increase in her permanent disability. Dr. Tyrone D. Artz performed a total knee replacement on the left in February 1998 and total knee replacement on the right in September 1998. The review and modification proceedings were commenced in 1997 and the limits in K.S.A. 44-528 on retroactive modification are not an issue.

Two physicians have testified in this review and modification proceeding. Dr. Artz testified that claimant has 10 percent impairment to the right upper extremity. He converts this to 6 percent of the whole person. Dr. Artz concludes claimant now has 37 percent impairment to each lower extremity. Dr. Artz converts the lower extremity ratings of 37 percent to whole person ratings of 15 percent for each extremity. He then combines the 15 percent ratings using the combined value chart from the *AMA Guides to the Evaluation of Permanent Impairment* to arrive at a total of 28 percent of the whole person for the lower

extremities. Dr. Artz adds the 6 percent whole person impairment for the right upper extremity, again using the combined values chart from the *AMA Guides*, to arrive at a total impairment of 32 percent of the whole person.¹

Dr. Pedro A. Murati concluded claimant has 7 percent impairment to the right upper extremity and converted this to 4 percent of the whole person. He rated the lower extremity impairment as a 50 percent impairment to each extremity or 20 percent of the whole person for each extremity. Dr. Murati also assigned 1 percent of the person for loss of range of motion in the lumbosacral spine and 5 percent for lumbosacral strain. Dr. Murati combined all of these ratings to arrive at a total impairment of 42 percent.

The Board concludes the ratings by both physicians were ratings of the total current impairment. The ratings would, therefore, include any preexisting impairment. Dr. Artz declined to state whether his rating included preexisting impairment. He described this as a legal question. But his rating for the knee was a rating based on the knee replacement. The knee replacements were done because the condition upon which the original agreed award was based had progressed to the point replacement was required. It is difficult to imagine how disability for total knee replacement could be anything other than inclusive of previous impairment to the knee. Dr. Murati's rating even more clearly includes the preexisting impairment. His rating was also a rating of the total impairment. He testified he would deduct the preexisting from his rating by using the combined value chart in the *AMA Guides*.

The Board notes the question in this case is not one of credit for preexisting disability under K.S.A. 44-501. There the questions may include questions about the extent to which preexisting disability contributed to the overall final disability. This is a review and modification proceeding. The question here is whether claimant's 7.5 percent impairment has worsened and, if so, how much. The Board concludes, based on the evidence presented, that the impairment has increased and is now 37 percent. This conclusion gives equal weight to the ratings by Dr. Artz and Dr. Murati.

The benefits should be calculated by determining the benefits for an award based on 37 percent and then deducting the benefits previously paid. *Bohanan v. U.S.D.* 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).² Claimant has now been paid a total of 55.43

¹ Respondent's brief asserts that Dr. Artz has added the 7.5 percent preexisting to 28 percent whole person to arrive at his final 32 percent. But it seems clear from his testimony that the 32 percent is a combination of the upper extremity 6 percent and the lower extremity 28 percent and this addition is supported by the combined values chart in the *AMA Guides to the Evaluation of Permanent Impairment*.

² The deduction in *Bohanan* is based on the number of weeks claimant was at a lower disability. The disability increased before all of the payments for the lower disability were due. Here, the claimant was at the 7.5 percent disability for all of the 31.13 weeks represented by the 7.5 percent, in fact longer. As a result, the deduction is 31.13 weeks.

weeks of temporary total disability. Based on the statements of claimant's counsel made at the regular hearing, the 55.43 includes the 4 weeks paid as a part of the original agreed award. Benefits for 37 percent would be calculated by multiplying the 37 percent times 374.57. The weeks of temporary total, except for the first 15 weeks, are deducted from the total 415 weeks to arrive at the 374.57 weeks. Claimant would, therefore, be entitled to 138.59 weeks of permanent partial disability benefits for the 37 percent disability. As indicated, claimant has already been paid 31.13 weeks pursuant to the original agreed award. Claimant is, therefore, entitled to an additional 107.46 weeks of permanent partial disability benefits at \$99.17 per week or \$10,656.81.

The Board notes this calculation is essentially the same method as claimant proposes and essentially the same as that used by the ALJ. In fact, the Board's calculation is the same as the calculation claimant originally proposed in its letter of September 8, 1999, Exhibit No. 3 to the regular hearing. The Board's final total differs only slightly from claimant's, probably because of a difference in rounding. On appeal, claimant has asked that we find the total disability to be 42 percent, not 37 percent, but then uses this same method to calculate the benefits. For reasons given above, the Board has found the total disability to be 37 percent.

The Board's calculation differs from that by the ALJ only because the ALJ used 28.01 weeks of permanent partial disability for the original 7.5 percent. It appears the ALJ has recalculated the benefits for 7.5 percent using the 55.43 weeks of temporary total disability. But the original agreed award was calculated using 4 weeks of temporary total disability and, based on that, respondent paid 31.13 weeks of permanent partial disability. The remaining weeks of temporary total disability were paid after the agreed award. The Board concludes respondent is entitled to subtract the 31.13 weeks of permanent partial disability actually paid from the weeks otherwise due for the 37 percent disability.

Finally, respondent has argued that the Board should first deduct the original 7.5 percent disability from 37 percent to begin with a 29.5 percent disability. Respondent asks that we calculate the award by first multiplying the 29.5 percent by 374.57 (respondent's example rounds this to 374.6) to begin with 110.5 weeks. Respondent would multiply the 110.5 weeks times the \$99.17 per week to arrive at \$10,958.30. The Board notes this method is, up to this point, substantially the same as the method used by the Board. The concept is identical, only respondent had deducted the 7.5 percent rather than deducting the number of weeks represented by 7.5 percent.³ But respondent would add one step. Respondent would then again subtract from the dollars paid for the 7.5 percent. This last

³ This portion of respondent's method varies from the Board's method and more nearly approximates the numbers used by the ALJ because, when the prior percentage is subtracted and the result multiplied by 374.6, the calculation, in effect, treats the initial 7.5 percent calculation as though 55.43 weeks of temporary total disability were paid in the 7.5 percent disability.

step respondent proposes obviously acts to subtract twice for the 7.5 percent. The Board agrees respondent is entitled to credit for amounts it has paid, but only once, not twice.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award entered by Administrative Law Judge John D. Clark on February 28, 2000, should be, and is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Linda Reynolds, and against the respondent, JC Penney, and its insurance carrier, Helmsman Management, Inc., for (in addition to the 55.43 weeks of temporary total disability and the 31.13 weeks of permanent partial disability previously paid) 107.46 weeks at the rate of \$99.17 per week or \$10,656.81, based on a 37 percent permanent partial disability, all of which is currently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Michael D. Streit, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director